

Mountaineer Magic

The Benefits of Litigating Insurance and Related Issues in West Virginia



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Attorney Fees and Expenses

◆ A plaintiff who substantially prevails by verdict or settlement in a first party action against the plaintiff's insurance company is entitled to an award of a reasonable attorney fee, irrespective of whether the insurance company's denial of the claim was in good faith or bad faith, reasonable or unreasonable.

Jordan v. National Grange Mut. Ins. Co., 393 S.E.2d 647 (W.Va. 1990)

Morrison v. Haynes, 452 S.E.2d 394 (W.Va. 1994)

Hayseeds v. State Farm Fire & Cas. Co., 353 S.E.2d 73 (W.Va. 1986)

Marshall v. Sasseen, 450 S.E.2d 791 (W.Va. 1994)

◆ The presumptively reasonable attorney fee award to an insured who has substantially prevailed against the insured's first party carrier ordinarily should be one-third of the recovery for recoveries of more than \$20,000 but less than \$1 million.

Hayseeds v. State Farm Fire & Cas. Ins. Co., 353 S.E.2d 73 (W.Va. 1986)

Marshall v. Sasseen, 450 S.E.2d 394 (W.Va. 1994)

◆ A first party claim in West Virginia is a claim for any type of coverage where the plaintiff seeking coverage is an insured under the policy in question. This is noted to distinguish a first party claim in West Virginia from the Pennsylvania MVFRL's definition of first party benefits which restricts them to no fault medical and wage loss benefits. For instance, uninsured and underinsured benefits are considered first party benefits in West Virginia.

Marshall v. Sasseen, 450 S.E.2d 394 (W.Va. 1994)

◆ A substantially prevailing plaintiff in a first party insurance claim is entitled to an award of litigation expenses.

Hayseeds v. State Farm Fire & Cas. Ins. Co., 353 S.E.2d 73 (W.Va. 1986)

***Marshall v. Sasseen*, 450 S.E.2d 394 (W.Va. 1994)**

***Morrison v. Haynes*, 452 S.E.2d 394 (W.Va. 1994)**

Prejudgment Interest

***Capper v. Gates*, 454 S.E.2d 54 (W.Va. 1994)**

◆ An award of prejudgment interest at 10% per year (not compounded) on liquidated damages is mandatory and is added by the trial court, not the jury.

***Perdue v. Doolittle*, 414 S.E.2d 442 (W.Va. 1992)**

◆ Liquidated damages are items of pecuniary loss which are certain or can be made certain by calculation.

***Hardman Trucking Co. v. Poling Trucking Co.*, 346 S.E.2d 551 (W.Va. 1986)**

◆ Prejudgment interest is not a cost, but rather a form of compensatory damages intended to make the plaintiff whole.

***Buckhannon-Upshur Airport Auth. v. R&R Contracting, Inc.*, 413 S.E.2d 404 (W.Va. 1991)**

◆ A plaintiff is entitled to prejudgment interest on economic damages awarded in a first party action against the plaintiff's insurance carrier.

***Berry v. Nationwide Mut. Fire Ins. Co.*, 381 S.E.2d 361 (W.Va. 1991)**

◆ Prejudgment interest is calculated on *all* pecuniary losses from the date the plaintiff's cause of action accrued (usually the date of injury) irrespective of when the losses are incurred.

***Grove v. Myers*, 382 S.E.2d 536 (W.Va. 1989)**

◆ Prejudgment interest is required to be awarded on pecuniary losses paid by a collateral

source.

Unfair Claim Settlement Practices (Statutory)

Pasquale v. Ohio Power Co., 418 S.E.2d 738 (W.Va. 1992)

◆ West Virginia recognizes first party and third party private causes of action based on violations of the state's unfair claim settlement practices statute. Attorney fees, compensatory damages, and punitive damages are available in these cases.

Jenkins v. J.C. Penny Cas. Ins. Co., 280 S.E.2d 252 (W.VA. 1981)

Mutafis v. Erie Ins. Exchange, 328 S.E.2d 675 (W.Va. 1985)

◆ Settlement of the underlying claim does not bar a subsequent UCSP claim if the insurance company is, or should be, aware of the possibility of an UCSP claim; and the release given in the underlying claim does not release the insurance company..

First Party Bad Faith (Common Law)

Poling v. Motorists Mutual Ins. Co., 450 S.E.2d 635 (W.Va. 1994)

◆ A substantially prevailing insured in a first party claim against the insured's carrier is entitled to an attorney fee award, litigation expenses, damages for aggravation, inconvenience, loss of use, and similar damages *irrespective of whether the carrier acted in bad faith.*

Hayseeds v. State Farm Fire & Cas. Ins. Co., 353 S.E.2d 73 (W.Va. 1986)

Marshall v. Sasseen, 450 S.E.2d 394 (W.Va. 1994)

◆ If the insurer acts in bad faith towards its insured, which is defined as intentionally denying a claim without a reasonable legal or factual basis for doing so, punitive damages are available.

Hayseeds v. State Farm Fire & Cas. Ins. Co., 353 S.E.2d 73 (W.Va. 1986)

Excess Verdicts

Berry v. Nationwide Mut. Fire Ins. Co., 381 S.E.2d 367 (W.Va. 1989)

◆ When a liability insurance carrier fails to settle with the plaintiff within its policy limit, after having been given a reasonable opportunity to do so, and a verdict in excess of its policy limit is returned against its insured, the insurer is liable for the excess; unless the insurer can prove by clear and convincing evidence its failure to settle was based on reasonable and substantial grounds, *and* the insurance company gave at least as much consideration to the interests of its insured as it did to its own interests.

Shamblin v. Nationwide Mut. Ins. Co., 396 S.E.2d 766 (W.Va. 1990)

◆ When an underinsured carrier fails to settle with its insured within its policy limit, after having been given a reasonable opportunity to do so, and a verdict in excess of liability and underinsurance combined is returned against the underinsured motorist, the underinsured carrier is liable to its insured for the excess; unless the underinsured carrier can prove by clear and convincing evidence its failure to settle was based on reasonable and substantial grounds, *and* the carrier gave at least as much consideration to the interests of its insured as it did to its own interests.

Joinder Defeating Diversity

Marshall v. Sasseen, 450 S.E.2d 394 (W.Va. 1994)

◆ An UCSP claim by the plaintiff against the defendant's liability carrier may be joined with the underlying claim against the defendant; however bifurcation allowing for resolution of the

underlying claim first is required.

State ex rel. State Farm Fire & Cas. Co. v. Madden, 451 S.E.2d 721 (W.Va. 1994)

◆ A declaratory judgment action may be brought by the plaintiff against the defendant's liability insurance carrier to determine if there is coverage of the plaintiff's claim against the defendant, and the declaratory judgment action may be joined with the underlying claim against the defendant. The declaratory judgment claim is to be decided first when it is joined with the underlying claim.

Self Insurance for Motor Vehicle Liability

Christian v. Sizemore, 383 S.E.2d 810 (W.Va. 1989)

◆ A self insured (at least a self-insured commercial trucking company) must provide liability coverage under the same circumstances and in the same amount as would be required of a commercial insurance company providing liability coverage.

Automobile Policy Medical Payments/Benefits Stacking

Jackson v. Donohue & Builders Transport, Inc., 1995 W.Va. LEXIS 68

◆ When an occupant of a vehicle is an insured for medical payments coverage from a West Virginia policy and for medical benefits under a Pennsylvania policy, the insured may collect these benefits from both policies under certain circumstances.

Klein v. State Farm Fire & Cas. Ins. Co., Cir. Ct. Brooke Co., W.Va., No. 93-C-40 (1993)

[Settled on appeal]

Recovery from the Defendant of Losses Paid by the Plaintiff's First Party Coverage.

◆ A defendant does not get a credit or an offset for money paid by the plaintiff's first party automobile insurance coverage. Thus the amount of first party medical benefits and wage loss benefits received by an insured under a Pennsylvania automobile policy may be collected from the defendant in a collision occurring in West Virginia, notwithstanding the unavailability of subrogation to the Pennsylvania carrier paying the first party benefits.

Johnson v. General Motors Corp., 483 S.E.2d 20 (W.Va. 1993)